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No. 89-144

In The

Supreme Court of the United States

October Term, 1989

LOCAL UNION NO. 246, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

Petitioner,

v.

BICKERSTAFF CLAY PRODUCTS CO., INC. and NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR LEAVE TO INTERVENE AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR BICKERSTAFF CLAY PRODUCTS COMPANY, INC. IN OPPOSITION

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I.

QUESTIONS PRESENTED

Respondent Bickerstaff Clay Products Company, Inc. ("Bickerstaff") contends that neither question formulated by Petitioner is presented by the lower court's decision.

1. The Eleventh Circuit accepted and conformed to the position of the National Labor Relations Board ("Board") by declining to apply any presumption regarding the extent of union support among replacements for striking employees and by deciding the case by an all-of-the-circumstances analysis. Hence there is no conflict between this decision and the Board on this question.

2. Petitioner's second question is an unfounded effort to characterize the Eleventh Circuit's reliance upon two facts present in this case as the creation of a presumption. Any fair reading of the lower court's decision reveals there is no basis for concluding that any such presumption was relied upon. As stated, the lower court reached its conclusion upon a consideration of all of the existing facts.

II.

LIST OF AFFILIATED COMPANIES

Bickerstaff Clay Products Company, Inc. is a Georgia corporation which has no parent, subsidiaries or affiliates.

III.

TABLE OF CONTENTS

Page

Questions Presented i

List of Affiliated Companies ii

Table of Contents iii

Table of Authorities iv

Statement of the Case 1

Summary of Argument 5

Argument 6

1. The Court Should Deny the Petition to Intervene 6

2. The Court Should Deny the Petition for Certiorari 12

Conclusion 18

IV.

TABLE OF AUTHORITIES

Pages

CASES CITED:

Agnes M. Banks, etc., Petitioner v. Chicago Grain Trimmers Association, Inc., et al., 390 U.S. 459, 20 L.Ed.2d 30, 88 S.Ct. 1140, reh. den. 391 U.S. 929, 20 L.Ed.2d 671, 88 S.Ct. 1800 (1968) 12

Bickerstaff Clay Products Company, Inc. v. NLRB, 871 F.2d 980 (1989) ..... *passim*

Buckley Broadcasting Corp. of California d/b/a Station KKHI (Station KKHI), 284 NLRB No. 113 ... 14, 15, 18

Clark Walter & Sons, Inc. v. U.S., 392 U.S. 659, 88 S.Ct. 2286, 20 L.Ed.2d 1348 (1968) 6

Columbia Pictures Corp., (1949) 85 NLRB 1085 7

Curtin Matheson Scientific, 287 NLRB 35 (1987). 5, 17, 19

Delaware Valley Citizens' Council v. Com. of Pa., 674 F.2d 970(7), 974 (CA3, 1982) 6

Eastern Central Motor Carries Association v. United States of America, 321 U.S. 194, 88 L.Ed. 668 (1944) 11

Edward G. Budd Manufacturing Co. v. NLRB, 332 U.S. 840, 922 L.Ed. 412 (1947) 11

Hourihan v. NLRB, (CA D of C; 1952) 22 L.C. ¶67, 256 7

Hunter v. Ohio ex rel. Miller, 396 U.S. 879, 24 L.Ed.2d 136, 90 S. Ct. 155 (1969) 12

International Union of Mine, Mill and Smelter Workers v. Eagle-Picher Mining and Smelting Company, 325 U.S. 335, 89 L.Ed. 1649 (1945) 11

TABLE OF AUTHORITIES – Continued

Page

International Union, United Automibile Aerospace and Agriculatural Implement Workers of America v. Scofield, 382 U.S. 205, 15 L.Ed.2d 272, 86 S.Ct. 373 (1965) 10

Lee d/b/a N.W. Photo Engraving Co., (1953) 106 NLRB 1067 7

McKenna v. Pan American Petroleum Corporation, 303 F.2d 778 (1,2), 779 (CA5, 1962) 6

Mulroy v. NLRB, (CA4, 1971) 66 LC ¶12, 141 7

NAACP v. State of New York, 413 U.S. 345, 37 L.Ed.2d 648, (8), 662, 93 S.Ct. 2591 (1973) 6

National Car Rental System v. NLRB, 594 F.2d 1203 (8th Cir. 1979) 13

New York v. Smith, 469 U.S. 864, 83 L.Ed.2d 135, 105 S.Ct. 204 (1984) 12

NLRB v. Acme Industrial Company, 384 U.S. 925, 16 L.Ed.2d, 529, 86 S.Ct. 1442 (1966) 10

NLRB v. Acme Industrial Co., 385 U.S. 432, 17 L.Ed.2d 495, 87 S.Ct. 565 (1967) 10

NLRB v. Curtin Matheson Scientific, Inc., 57 U.S.L.W. 3835 (88-1685) ..... *passim*

NLRB v. Shurtenda Steaks, Inc., 424 F.2d 192 (1,3), 194-195 (CA10, 1970) 6

NLRB v. Randle-Eastern Ambulance Service, Inc., 584 F.2d 720 (5th Cir. 1978) 4, 13, 16

NLRB v. United Food and Commercial Workers, 484 U.S. ___, 98 L.Ed.2d 429, 108 S.Ct. ___, [No. 86-594] (1987) 8

TABLE OF AUTHORITIES – Continued

Page

NLRB v. Windham Community Memorial Hospital, 577 F.2d 805, 812-13 (2d Cir. 1978) 13

Pennco, Inc. v. National Labor Relations Board, 459 U.S. 994, 74 L.Ed.2d 392, 103 S.Ct. 355 (1982) 13

Pennco v. NLRB, 684 F.2d 340 (6th Cir. 1982) 13

Pyramid Lake Paiute Tribe of Indiana v. Truckee Carson Irrigation District, et al., 464 U.S. 875, 78 L.Ed.2d 186, 104 S.Ct. 210 (1983) 12

Retail Clerks, Local 954 v. Rothman, (CA D of C, 1962), 44 L.C. ¶17, 362, 298 F.2d 330 7

Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055 (1st Cir. 1981) 13

Teamsters, Brewery & Beverage Drivers & Workers Local 67, (1953) 107 NLRB 299 7

Thrifty Shoppers Scrip Co. v. U.S., 389 U.S. 580, 88 S.Ct. 693, 19 L.Ed.2d 781 (1968) 6

Times Square Stores Corp., (1948) 79 NLRB 361 7

U.S. v. Blue Chip Stamp Co., 272 F.Supp. 432 affirmed sub nom 6

U.S. v. Western Electric Co., 1968 Trade Cases, ¶72, 415 (D.N.J.) affirmed sub nom. 6

U.S.A. v. Associated Milk Producers, Inc., 534 F.2d 113(2), 116 (CA8, 1976) 6

Whisper-Soft Mills v. NLRB, 754 F.2d 1381, 1387-88 (9th Cir. 1984) 13

TABLE OF AUTHORITIES – Continued

Page

RULES CITED:

Federal Rules of Civil Procedure, Rule 59(2) 10

TREATISE CITED:

R. Gorman, Labor Law 112 (1976)..... 14

LAW REPORTS CITED:

Commerce Clearing House Labor Law Reporters ¶5560, 2651, P. 13867, 26..... 8

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STATEMENT OF THE CASE

In its statement of the case, Petitioner mischaracterizes the decision of the Eleventh Circuit in the following respects:

1. Petitioner incorrectly contends that "the Eleventh Circuit declined to embrace the Board's no-presumption rule." (Pet. 3)

2. Petitioner erroneously states that "the Court focused principally on the significance of the permanent replacement of striking employees." (Pet. 7)

3. Petitioner wrongly contends that the court concluded "the so-called 'Gorman presumption' should apply" under these circumstances. (Pet. 8)

The history of labor relations between Bickerstaff and this Union began in 1965 when the Union petitioned for recognition at three of the manufacturing plants now operated by Bickerstaff in Russell County, Alabama. Although the Union won only one election, the present management of Bickerstaff voluntarily recognized the Union throughout its manufacturing facilities. During the next 20 years the Union and Bickerstaff successfully negotiated successive labor agreements without a work stoppage. (App. 2a).

A change in the relationship between the Union and Bickerstaff's employees began during negotiations for a new labor agreement in the fall of 1985. Although there were a number of bargaining sessions from September until the first week of November, the parties remained drastically apart on economic issues. In an effort to avert a work stoppage, Bickerstaff made its final offer on November 6, 1985. The Union responded by calling the first strike in the history of the relationship between these parties. (App. 3a). The Union and the Company met after

the strike on November 18, 1985, and again on December 9, 1985 to no avail. On December 12, 1985, the chief executive officer of the Company met privately with a long-time representative of the International Union in an effort to break the deadlock. There was one last meeting between the Union and the Company on January 13, 1986. (App. 4a).

Thirty-five percent of the work force refused to participate in the strike from the outset. (App. 3a). By December 12th or 13th a majority of those who had struck abandoned the strike to return to work. A total of 147 of the former striking employees returned to work and, on the date that Bickerstaff withdrew recognition, 133 of the former strikers were at work. (App. 10a).

Shortly after the strike began, the Company advertised for permanent replacements. During the first ten days of the strike 150 new workers had been hired. (App. 9a & 10a). Ninety-three striker replacements were working at the time Bickerstaff withdrew recognition of the Union. (App. 10a). On two occasions during negotiations following the strike, the mediator presented Bickerstaff with the Union's demand that striker replacements be discharged. (App. 10a).

Threats were made against employees who crossed the picket line and they were the targets of numerous incidents of violence and destruction of property. (App. 10a).

Thirty-eight employees either resigned or withdrew from union dues deductions after the strike began on November 11, 1986. (App. 11a).

During the strike the Union's management and leadership deteriorated. The local business manager resigned on December 12, 1985. A succession of four representatives of the International Union were unable to give direction to the management of the local and on January 3, 1986 the local Union was placed under trusteeship and its elected officials dismissed. (App. 11a). On January 23, 1986, Bickerstaff declared an impasse and implemented its final offer. Bickerstaff received no further communication from the Union until its letter of April 8, 1986, three months later. (App. 11a).

Shortly before Bickerstaff withdrew recognition of the Union, it received a letter from the Regional Director of the Board setting out its investigative findings in connection with an unfair labor practice charge filed against the Union by three of Bickerstaff's employees. The Board found that some of the members of the Local were dissatisfied with representation provided them by the Union and that the Union had reneged upon promises to pay strike benefits to the strikers. (App. 12a & 13a). Numerous newspaper stories reported on the workers' disillusionment and dissatisfaction with the Union. One such story, which was verified by the Union representative who testified at the hearing, quoted strikers as predicting " . . . that if Laborers International tries to maintain Local 246, it will find the biggest brick wall at Bickerstaff is between the Union and its estranged members." (App. 13a N.7).

The Eleventh Circuit analyzed the composition of the bargaining unit on the date Bickerstaff withdrew recognition and compared those statistics with the composition of the bargaining unit in *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978), and

concluded that the evidence of non-support was much more persuasive in *Bickerstaff Clay Products Company, Inc. v. NLRB*, 871 F.2d 980 (1989). (App. 24a & 25a).

Upon consideration of all of the circumstances present in *Bickerstaff*, the Eleventh Circuit concluded that the substantial evidence on the record as a whole did not support the Board's conclusion that the Company unlawfully withdrew recognition. (App. 28a).

SUMMARY OF ARGUMENT

Petitioner has not made the requisite strong showing of justification for failure to request intervention earlier. The Board is vested with policy-making authority in labor matters. It has made the decision not to apply for certiorari in *Bickerstaff*. Its decision in this regard is not subject to judicial review and should not be overridden by the Petitioner in this case.

The petition to intervene should be denied because Petitioner has no standing; the petition is not timely; and the authority cited by Petitioner does not support intervention in this case.

The questions raised by Petitioner are not presented by the Eleventh Circuit's decision in *Bickerstaff*. This court has granted certiorari in *Curtin Matheson*,[1] which is a case in which the issue of whether and to what extent presumptions should be applied regarding the support of striker replacements for an incumbent union. It is neither necessary nor appropriate to grant certiorari in *Bickerstaff* in order to decide this issue.

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[1] *NLRB v. Curtin Matheson Scientific, Inc.*, 57 U.S.L.W. 3835 (88-1685).

The Eleventh Circuit followed the Board's no-presumption, fact-dependent approach to withdrawal of recognition cases. The narrow holding of *Bickerstaff* does not raise an issue significant to national labor policy. Thus the petition for the writ of certiorari to the Eleventh Circuit Court of Appeals should be denied.

ARGUMENT

1. COURT SHOULD DENY PETITION TO INTERVENE

Motions For Intervention Made After Entry Of Final Judgment Are Granted Only On A Strong Showing Of Entitlement And Justification For Failure To Request Intervention Sooner.

See *U.S. v. Blue Chip Stamp Co.*, 272 F. Supp. 432 affirmed sub nom. *Thrifty Shoppers Scrip Co. v. U.S.*, 389 U.S. 580, 88 S.Ct. 693, 19 L.Ed.2d 781 (1968); *U.S. v. Western Electric Co.*, 1968 Trade Cases, ¶72, 415 (D., N.J.) affirmed sub nom. *Clark Walter & Sons, Inc. v. U.S.*, 392 U.S. 659, 88 S.Ct. 2286, 20 L.Ed.2d 1348 (1968); *U.S.A. v. Associated Milk Producers, Inc.*, 534 F.2d 113(2), 116 (CA8, 1976); *NAACP v. State of New York*, 413 U.S. 345, 37 L.Ed.2d 648, (8), 662, 93 S.Ct. 2591 (1973); *Delaware Valley Citizens' Council v. Com. of Pa.*, 674 F.2d 970(7), 974 (CA3, 1982); *McKenna v. Pan American Petroleum Corporation*, 303 F.2d 778 (1,2), 779 (CA5, 1962); *NLRB v. Shurtenda Steaks, Inc.*, 424 F.2d 192 (1,3), 194-195 (CA10, 1970).

The Labor Department through the National Labor Relations Board and its General Counsel, establishes the policies of the United States in labor matters.

When the NLRB elected not to appeal the ruling of the Eleventh Circuit Court of Appeals in *Bickerstaff Clay Products Company, Inc. v. NLRB*, 871 F.2d 980, decided on April 27, 1989, that ruling became the equivalent of the law of this case. The NLRB and its General Counsel make the labor policy of the government and are charged with the responsibility for enforcing its labor laws.

Only the NLRB General Counsel is authorized to issue and prosecute complaints charging unfair labor practices. An issue is not properly before the board unless it is raised by a representative of the General Counsel. *Teamsters, Brewery & Beverage Drivers & Workers Local 67* (1953), 107 NLRB 299.

The General Counsel is within his authority when he refuses to issue a complaint. *Mulroy v. NLRB*, (CA4, 1971) 66 LC ¶12, 141.

Except in the case of an abuse of discretion on the part of the General Counsel, a court has no authority to order him to issue a complaint. *Retail Clerks, Local 954 v. Rothman*, (CA D of C, 1962), 44 LC ¶17, 362, 298 F.2d 330; *Hourihan v. NLRB*, (CA D of C, 1952) 22 L.C. ¶67, 256.

The General Counsel has the final word as to issuing complaints. His refusal to issue a complaint is not subject to Board Review. *Columbia Pictures Corp.* (1949) 85 NLRB 1085; *Times Square Stores Corp.* (1948) 79 NLRB 361; *Lee dba N.W. Photo Engraving Co.* (1953) 106 NLRB 1067.

The refusal of the General Counsel to issue a complaint is an exercise of administrative discretion and is *not* subject to judicial review, either under Declaratory Judgment Act or the Administrative Procedure Act. See the numerous Court of Appeals cases cited in CCH Labor Law Reports ¶5560, 2651, P. 13867.

Finally, in a recent decision, *NLRB v. United Food and Commercial Workers*, 484 U.S. ___, 98 L.Ed.2d 429, 108 S.Ct. ___ [No. 86-594] (1987), this Court held:

> "Prehearing dismissal of unfair labor practice complaint by General Counsel of NLRB pursuant to informal settlement held not subject to judicial review under provisions of National Labor Relations Act or of Administrative Procedure Act." (L.429)

This is a full bench decision (the Chief Justice and Justices Scalia, White and O'Connor concurred in a separate opinion unrelated to the point in the instant case.)

The majority opinion written by Justice Brennan is so thorough, so lucid and so well annotated, that we resist the temptation to quote selected excerpts and simply say that, in the case at bar, the decision of the General Counsel not to petition for certiorari in this Court is not subject to judicial review. The petitions of the Union to intervene and for certiorari must be denied.

Even if it could be said that judicial review is available, the Union should not be permitted to force the NLRB and the General Counsel into a review situation when they do not wish review. However it is broken down or divided, they do determine and enforce the policy of the government in labor matters and they

should not, as a matter policy, be overridden in the case at bar.

For example, as the Union points out (page 12, Section II, of its petition for certiorari) the Court has already granted certiorari on the Board's petition in *NLRB v. Curtin Matheson Scientific, Inc.*, 57 U.S.L.W. 3835 (88-1685). This is a case which, whether or not the " . . . question presented . . . is identical to the first question presented in the case at bar", (L.12), certainly deals with the same subject matter. It should be within the discretion of the Board and the General Counsel to make a decision as to whether or not to petition for certiorari in the case at bar. They might consider it helpful or they might not.

The Union Has No Standing As A Union Representing Bickerstaff Employees.

There is a particular reason in this case as to why the General Counsel and the NLRB, not the Union, should make the decision as to whether or not to seek judicial review of the Eleventh Circuit decision. Whether or not the Union has standing to file a petition for certiorari on behalf of Bickerstaff employees is also a very closely related question decided by the Eleventh Circuit in this case. While the questions are not precisely the same, the evidence presented below as to Bickerstaff's "good faith doubt of (the) union's majority status" raises at least a serious doubt that, in fact, the Union represented a majority of the employees. This evidence is detailed in the Eleventh Circuit opinion (App 9a-14a). These charges were not rebutted by the NLRB and so the factual findings in the Eleventh Circuit opinion are binding. These findings demonstrate that the Union no longer represents

the Bickerstaff employees and, therefore cannot act for them in this case. Even if that is not so, the Union's standing is so tenuous that the decision on seeking judicial review should be made by the General Counsel and/or the Board, not the Union.

The Petition For Leave To Intervene Was Not Timely.

Rule 59(2), F.R.C.P. provides:

> "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

The petition for leave to intervene was a motion to alter or amend the judgment to add a party, the Local Union. It was served on July 26, 1989, 90 days beyond the date of the judgment on April 27, 1989.

The Local Union, As Petitioner Has No Standing To Intervene In The Case.

The Union cites authorities to support its position that it has standing on pages 8-10 of its petition to intervene. They do not support the position of the Union:

> *N.L.R.B. v. Acme Industrial Company,* 384 U.S. 925, 16 L. Ed.2d, 529, 86 S.Ct. 1442 (1966) holds merely that the motion for leave to intervene is granted. In *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 17 L.E2d 495, 87 S.Ct. 565 (1967), the report of the case itself, the issue is not discussed.
>
> *International Union, United Automobile Aerospace and Agricultural Implement Workers of America v. Scofield,* 382 U.S. 205, 15 L.Ed.2d 272, 86 S.Ct. 373 (1965) held that the Union was entitled to intervene in the Court of Appeals although it had been successful before the NLRB.

International Union of Mine, Mill and Smelter Workers v. Eagle-Picher Mining and Smelting Company, 325 U.S. 335, 89 L.Ed. 1649 (1945).

In the last case, the Union was permitted to intervene in the Circuit Court of Appeals in a proceeding instituted by the NLRB. It had standing to review the Court of Appeals order which denied the petition of the Board to reopen an order even though the Board itself elected not to seek review. The Board, although it did not itself apply for certiorari, did appear in support of the petition. In denying the relief sought by the Union, the Supreme Court emphasized the importance of finality of judgments saying:

> "Finality to litigation is an end to be desired as well in proceedings to which an administrative body is a party as in exclusively private litigation. The party adverse to the administrative body is entitled to rely on the conclusiveness of a decree entered by a court to the same extent that other litigants may rely on judgments for or against them."
>
> *Edward G. Budd Manufacturing Co. v. NLRB,* 332 U.S. 840, 922 L.Ed. 412 (1947).

The Petition of the Foreman's Association of America for leave to intervene was granted without discussion and without any indication that intervention was opposed. The Union was not a party in the Court of Appeals.

Eastern Central Motor Carriers Association v. United States of America, 321 U.S. 194, 88 L.Ed. 668 (1944). The party which did not appear in the District Court was permitted to intervene N.6 (p. 199) states:

> "This intervenor did not appear in the District Court, not having notice of the proceedings there until after the argument there."

New York v. Smith, 469 U.S. 864, 83 L.Ed.2d 135, 105 S.Ct. 204, simply denied the petition for the writ of certiorari, without comment on any other aspect of the case.

Pyramid Lake Paiute Tribe of Indiana v. Truckee Carson Irrigation District, et al., 464 U.S. 875, 78 L.Ed.2d 186, 104 S.Ct. 210 (1983), denied a motion for rehearing without alluding to any issue or question.

Hunter v. Ohio ex rel. Miller, 396 U.S. 879, 24 L.Ed.2d 136, 90 S.Ct. 155 (1969) held: "Motion of petitioner for leave to intervene granted", but it denied certiorari. There was no discussion as to either.

Agnes M. Banks, etc., Petitioner v. Chicago Grain Trimmers Association, Inc., et al., 390 U.S. 459, 20 L.Ed.2d 30, 88 S.Ct. 1140, reh. den. 391 U.S. 929, 20 L.Ed.2d 671, 88 S.Ct. 1800 (1968). Intervention was not discussed and, in fact, we were not able to find any reference to it.

2. THE COURT SHOULD DENY THE PETITION FOR CERTIORARI.

This court has granted the National Labor Relations Board's petition for certiorari in *NLRB v. Curtin Matheson Scientific, Inc.*, 57 U.S.L.W. 3835 (No. 88-1685), decision below 859 F.2d 362 (5th Cir. 1988). The Petitioner in this case has copied the question presented in *Curtin Matheson* in an effort to persuade this court to take this case along with *Curtin Matheson*. Petitioner also attempts to improvise a second issue by characterizing certain of the evidentiary factors considered by the court below as an

additional presumption. These are thinly-veiled attempts to latch on to the presumption issue which this court will review in *Curtin Matheson*. Neither question is presented by the circuit court's decision in *Bickerstaff*.

In the 1982 dissenting opinion upon the denial of certiorari in *Pennco, Inc., v. National Labor Relations Board*, 459 U.S. 994, 74 L.Ed.2d 392, 103 S.Ct. 355 (1982), three Justices of this court perceived a need to resolve a conflict among the circuits and between the courts of appeal and the NLRB over "(t)he questions of whether presumptions can properly be used to determine whether a union has the support of striker replacements, and whether replacements should be presumed to oppose the certified union or favor the certified union." (Id.)

At that time three approaches to the problem were being advocated. The Board, without the support of any of the six circuit courts which had considered the question[2], contended that striker replacements should be counted as favoring the certified union in the same ratio as the strikers whom they replaced. The First, Fifth, Eighth and Ninth Circuits seemed to adopt the opposite presumption relying on reasoning taken from the

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[2] *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir.1981); *NLRB v. Windham Community Memorial Hospital*, 577 F.2d 805, 812-13 (2d Cir. 1978); *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir.1978); *National Car Rental System v. NLRB*, 594 F.2d 1203 (8th Cir.1979); *Whisper-Soft Mills v. NLRB*, 754 F.2d 1381, 1387-88 (9th Cir.1984); and *Pennco v. NLRB*, 684 F.2d 340 (6th Cir.1982).

Gorman treatise.[3] The Second and the Sixth Circuits embraced neither presumption and urged the consideration of all the circumstances on a case-by-case approach.

Since then the NLRB has abandoned its former presumption and has adopted a neutral, ad hoc position requiring "further evidence of union non-support by striker replacements in order to count them against the incumbent union." *Buckley Broadcasting Corp. of California d/b/a Station KKHI (Station KKHI)*, 284 NLRB No. 113 (July 27, 1987), application for enforcement pending, 284 NLRB No. 113 (9th Cir. filed March 7, 1988). Thus the only two positions regarding presumptions presently being advocated are the Board's neutral position announced in *Station KKHI* and the Gorman presumption recognized again by the Fifth Circuit in *Curtin Matheson*.

In deciding *Bickerstaff*, the Eleventh Circuit declined to follow the Fifth Circuit's present view and, instead, chose to follow the neutral approach advocated by the NLRB. Because the Eleventh Circuit chose not to indulge a presumption, it cannot be argued that its decision presents the question of whether the NLRB "may refuse to apply any presumption." The rule in the Eleventh Circuit under *Bickerstaff* would be that the NLRB may, indeed should, refuse to apply any presumption regarding striker replacements in withdrawal of recognition cases.

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[3] R. Gorman, Labor Law 112 (1976): "[I]f a new hire agrees to serve as a replacement for a striker (in union parlance, a strike breaker, or worse), it is generally assumed that he does not support the Union and that he ought not to be counted toward a Union majority."

Because the real conflict lies in the tension between the Gorman presumption, recognized in *Curtin Matheson*, and the Board's position in *Station KKHI*, the question can be resolved fully by this court on the writ of certiorari to the Fifth Circuit granted in *Curtin Matheson*. The scope of the *Bickerstaff* decision was narrow and fact-dependent. Thus no purpose would be served by granting certiorari in this case. This conclusion is obvious from the very fact that the NLRB has decided not to apply for certiorari in this case while pursuing the writ in *Curtin Matheson*. Regardless of which course this court chooses to follow in *Curtin Matheson*, the *Bickerstaff* outcome would not be altered. If it is the Gorman presumption, the case for the employer's good faith doubt would be even stronger. The lower court has already evaluated the evidence under a no-presumption, totality-of-the-circumstances analysis, consistent with the Board's approach in *Station KKHI*, and concluded that an objective basis for a good faith doubt existed.

In an apparent effort to persuade this Court that *Bickerstaff* presents the identical question presented by *Curtin Matheson*, Petitioner misrepresents the basis of the Eleventh Circuit's decision:

> The Eleventh Circuit reasoned that *Randle-Eastern* was consistent with *Station KKHI* because the Gorman presumption should apply where 'the union is negotiating for [the striker replacement's] discharge and he crosses a union-sponsored picket line, violent or not, to report to work' ".
>
> (Pet. p. 12 & 13)

Nowhere in the opinion of the lower court is there even a suggestion that the Gorman presumption should be applied under *any* circumstances. To say that the Eleventh Circuit decision applies the Gorman presumption is simply wrong. Petitioner perpetuates this mischaracterization by arguing at page 14 of its petition that "The Eleventh Circuit held the no-presumption rule in *Station KKHI* could be 'reconciled' with the Gorman presumption embraced by the Fifth Circuit in *Randle-Eastern*." To the contrary, the Eleventh Circuit's construction of *Randle-Eastern* is that the former NLRB presumption, of striker replacements favoring the union in the same ratio as the employees they replace, did not apply where there was other objective evidence of union non-support among the replacements. The clear import of the Eleventh Circuit's view is that *Randle-Eastern* was not bottomed upon the Gorman presumption but upon the other "objective evidence" of the union bargaining for the discharge of the replacements and of picket line violence.

> "We decline to read *Randle-Eastern* so broadly as to establish an unqualified rule applicable in every strike situation where replacement workers are hired. The decision in *Randle-Eastern* should be limited to the specific facts of the case. Read more narrowly, *Randle-Eastern* does not conflict with the Board's *Station KKHI* ad hoc approach since the evidence presented by the employer in *Randle-Eastern* is sufficient to satisfy the requirement of *Station KKHI* that the Company present 'some further evidence of union non-support' in order to count replacements as employees whom the company doubts support the Union."
>
> (App. 22a, 23a).

Petitioner apparently believes that the key to the grant of certiorari in this case lies in convincing the court that presumptions were somehow recognized and applied by the Eleventh Circuit. Petitioner characterizes as "presumptions" the fact of bargaining by the union for the discharge of replacements to make room for strikers and the fact that the replacements crossed a union-sponsored picket line, at least for a time, in an atmosphere of violence. The Petitioner fails to cite any authority for its proposition that these are not facts but presumptions. There is no support for this argument. These are objective facts and circumstances, among others also recognized by the Board and the courts, from which an employer may draw the reasonable inference that replacements do not support the striking union.

In the Board's decision in *Curtin Matheson,* it noted that these significant factors were not present.

> The Court in *Randle-Eastern* inferred that the employees did not support the union in light of *inter alia* violence directed against those who crossed the picket line and the union's negotiating position that the strike replacements would have to be discharged to make room for striking employees when the strike was over. *Id.* at 728. We note that *these two circumstances in particular,* as well as others the court relied on, are not present in the instant case. *Curtin Matheson Scientific,* (emphasis supplied). 287 NLRB 35 (1987)

These were two circumstances among many others which formed the totality of the circumstances present in this case.

CONCLUSION

In overturning the Board's decision in *Bickerstaff*, the Eleventh Circuit concluded that "the Board had erroneously looked at each piece of evidence in isolation instead of looking at the totality of factors." (App. 28a) In addition to the circumstances relating to striker replacements, the lower court considered the following factors: the large number of employees who never participated in the strike, the fact that the picket lines had been abandoned, the number of strikers that had returned to their jobs, the violence and threats associated with the strike, the number of employees who had resigned from the union or withdrawn from dues check-off, the resignation of the union business manager and disruption of union leadership during the strike, the inactivity of the union prior to withdrawal of recognition, the employee dissatisfaction and disillusionment with the union reported in newspapers and in the Board's own investigation of an unfair labor practice charge brought against the union by several strikers. The cumulative effect of these factors overwhelmingly meets "the require(ment) of 'some further evidence of union non-support' that an employer's claim of good faith doubt of the union's majority is sufficient to rebut the overall presumption of continuing majority status." *Station KKHI*, 284 NLRB 113.

Rather than "presumptions", these were the facts upon which the Eleventh Circuit relied in concluding that an objective basis for a good faith doubt of majority support for the striking union existed at Bickerstaff Clay Products Company, Inc. As the General Counsel has concluded, this case is neither necessary nor appropriate for

this Court's review of the validity of the Gorman presumption espoused by the Fifth Circuit in *Curtin Matheson*. Bickerstaff respectfully prays that the petitions for intervention and for certiorari be denied.

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